CRIMINAL APPEAL NO.695 OF 1988
with
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CRIMINAL APPEAL NO.721 OF 1988

Date of decision: 26.2.1996.

For approval and signature

The Honourable Mr. Justice R. R. Jain

and

The Honourable Mr. Justice H. R. Shelat

Criminal Appeal No.695 of 1988
Mr. M.J. Budhbhatti and Mr. B.J. Jadeja, advocates for appellants.
Mr. K.P. Raval, A.P.P. for respondent-State.
Mr. K.J. Shethna, advocate for original complainant.

Criminal Appeal No.697 of 1988
Mr.Adil P. Mehta for Mr. K.J. Shethna, advocate for the appellants.
Mr. N.R. Shukla, A.P.P. for respondent-State.

Criminal Appeal No.721 of 1988
Mr. K.P. Raval, A.P.P. for appellant-State.
Mr. P.B. Bhatt, advocate, appointed for respondent.

1. Whether Reporters of Local Papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether their Lordships wish to see the fair copy of judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made

thereunder?

5. Whether it is to be circulated to the Civil Judge?

Coram: R.R.Jain & H.R. Shelat, JJ.

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February 26, 1996.

Common oral judgment (Per Jain, J.)

An offence vide C.R. No.89/87 was registered against six accused under Sections 302, 326, 324, 449, 143, 147, 148, 149 of Indian Penal Code read with Section 135 of the Bombay Police Act with Rapar Police Station, District Kachchh-Bhuj. After investigation, on charge-sheet being filed, case was registered as Sessions Case No.2 of 1988 in the Court of learned Additional Sessions Judge, Kachchh at Bhuj, who, after trial, convicted five of the six accused, that is, accused Nos.1 to 5, for offences under Section 302 read with Section 149 and under Sections 326, 324 and 449 read with section 149 of the Indian Penal Code and passed appropriate sentence whereas accused No.6 - Padhiyar Vankaji Modji was acquitted. Original accused Nos.1 to 5, aggrieved by the order of conviction and sentence preferred Criminal Appeal No.695 of 1988 whereas the State has preferred Criminal Appeal No.721 of 1988 challenging the order of acquittal passed against accused No.6, Padhiyar Vankaji Modji. Since both these appeals are arising from the same judgment delivered by learned Additional Sessions Judge, Kachchh at Bhuj, are disposed of by this common judgment.

From the record it also transpires that on the strength of complaint filed by present appellants/accused, a cross case was also registered against the members of complainant's group. The cross case against the complainant's group was registered as Sessions Case No.3 of 1988 against Karman Ambavi Patel and Narsang Ambavi Patel, who were also held guilty for offences charges and were convicted to undergo rigorous imprisonment for life for the offences under Section 302 read with Section 34 of IPC for causing death of Ranubha Hathuji. The appellants of Criminal Appeal No.697 of 1988 are the original accused in Sessions Case No.3 of 1988 and aggrieved by the order of conviction and sentence, have preferred this appeal. Since Sessions Case No.3 of 1988 is in the nature of cross complaint and between the same parties/group, the appeal arising therefrom is also disposed of simultaneously by this common judgment.

It would be appropriate to state here salient features of Sessions Case No.2 of 1988 giving rise to two appeals, being Criminal Appeal No.695 of 1988 and 721 of 1988.

The complaint, Ex. 43, which set the investigating agency in motion, was lodged by minor Meghaji Ambavi, aged about 14 years. The incident is alleged to have occurred on 19.10.1987 at about 7/ 7.30 P.M. As alleged, the complainant and his brothers Karman Ambavi Patel and Narsang Ambavi Patel, had brought a drum of water from their well. The drum was kept outside the house and they were fetching water therefrom. In the meanwhile, one Ranubha Hathuji came with stick and gave blow on the head of complainant's father, i.e., Ambavi, as a result of which the deceased Ambavi was injured and bleeding. However, seizing the opportunity, uncle of the complainant, Virji Bhana and another person Bhavan, who, by coincidence came there, removed the injured Ambavi from the place and made him to lie on a cot inside the house. As alleged, two other sons of injured, Karman Ambavi Patel and Narsang Ambavi Patel, who were inside the house came outside on hearing noise and quarrel and they had some quarrel with Ranubha and thereafter had disappeared. As alleged, they were frightened and, therefore, every member of the family came inside and closed the doors and bolted from inside. However, within a very short time, accused Nos.1 to 5, armed with weapons, sticks and stones, attacked on their residence and broke open the door, paved entry and their first target was Rajiben, the mother of the complainant. Then his grand mother Meghiben and then have proceeded towards injured Ambavi, who was lying on a cot but on seeing the accused, ran away in another room. However, he was chased and was injured by giving fatal blows by the accused. As a result of this attack by accused, injured Ambavi died on the spot and his deadbody was lying in between the heap of wheat bags. In this background, the investigation was set in motion and the accused were tried by the learned Additional Sessions Judge.

M/s. Budhbhatti and Jadeja, learned advocates, appeared for the appellants of Criminal Appeal No.695 of 1988 and respondent of Criminal Appeal No.721 of 1988, and have vehemently argued that the entire case is fabricated and is full of mystery. The investigation is partisan and does not inspire confidence and, therefore, on the face of it, the case of prosecution cannot be believed. It is also argued that the entire prosecution case sans support of independent witness and the injuries are also not corroborated by medical evidence as well as weapons

used.

On behalf of the respondent in Criminal Appeal No.721 of 1988, it is submitted that he has been roped in with an ulterior motive and has been falsely implicated by subsequently developing the case. It is forcefully argued that at the earliest opportunity while lodging the complaint, Ex. 43, his name has not been disclosed nor any overact is alleged and, therefore, the accused No.6 was not at all present and thus it is argued that the trial Judge has rightly acquitted him disbelieving the prosecution story.

Mr. Budhbhatti has argued that FIR, Ex. 43, lodged by Meghji Ambavi, has been wrongly relied upon by the trial Judge as FIR as the investigating agency have had information about this incident much prior to that and, therefore, FIR, Ex. 43, should have been treated as statement under Section 161 of the Criminal Procedure Code recorded at the time of investigation and it has no evidential value. Our attention is drawn to Ex. 50, an entry in the Station Diary of Rapar Police Station, recorded on 19.10.1987 at about 7.45 P.M. This is an information given by appellant No.3, Tapubha Anandji. We have carefully gone through this document and say that it does not conform to the ingredients of Section 154 of Cr.P.C. so as to be treated as FIR. As a cardinal rule, any information to be treated as FIR within the purview of Section 154 of Cr.P.C. should not be cryptic and on the face of it disclose commission of cognizable offence. The information at Ex.50 simply refers to a quarrel between two groups i.e., Patel and Darbar. The information further discloses that one Ranubha Hathuji is injured and police protection was sought. The information does not refer to use of weapons, does not give names of parties, nature of attack and injury. It simpliciter refers to breach of peace and not commission of any cognizable offence and, therefore, cannot be treated as FIR as contemplated under Section 154 of Cr.P.C. It has come on record through the evidence of investigating officer that on receiving this information, he proceeded towards the spot and only thereafter having found dead body he came to know about commission of cognizable offence and, therefore, he received complaint from Meghji Ambavi between 7 and 7.30 P.M. and started investigation. The information in the nature of complaint received from Maghji Ambavi has been produced at Ex.43. It is true that it is subsequent in point of time to that of Ex.50, but cannot be said to have been recorded during investigation. As discussed above, Ex.50 is an information recorded by the police at 7.45 P.M.

without giving reference of a cognizable offence and, therefore, cannot be treated as FIR. Consequently, the learned trial Judge was right in ignoring Ex.50 and treating Ex.43 as FIR.

While assailing conviction, heavy reliance is placed on the testimony of P.W.11, Manilal Nyalchand Sanghvi, Ex.40. According to Mr. Budhbhatti, this witness is a social worker and an independent witness and, therefore, carries much weight qua merits of this case. But Mr. Raval, learned A.P.P. has vehemently argued that the testimony of this witness is no more a piece of evidence in the eye of law in light of Section 138 of the Indian Evidence Act. From the record it is crystal clear that there was no examination-in-chief of this witness and this witness was straightway offered for cross-examination by passing order below Ex.32. Section 138 of Indian Evidence Act refers to order of examination and provides that witness shall be first examination-in-chief, then, if the adverse party so desires, cross-examined and then if the party calling him so desires he be re-examined. If a person is examined-in-chief then only he can be treated as a witness and so the statements given as a piece of evidence to be relied upon by the Court. If a person is not examined-in-chief then tendering for cross-examination is not permissible under law for the simple reason that on what basis the witness is to be cross-examined. The object of cross-examination is to test the veracity of the statements and ascertain reliability. If the witness says something in his examination-in-chief and inconsistent/ contrary in cross-examination, then such person making statements which suit his convenience cannot be treated as reliable and trustworthy witness and the Court may not rely upon such statements. But if a person is not examined-in-chief then how the court would come to know about contradictory or inconsistent version? Hence, there must be some substantive piece of evidence before being cross-examined. Consequently, in our view, the practice adopted by the learned Additional Sessions Judge is inconsistent with the provisions of Section 138 of the Indian Evidence Act and is not permissible in law. On this point, out attention is drawn by the learned A.P.P. to a recent decision of the Supreme Court in the case of Sukhwant Singh v. State of Punjab, reported in 1995 SCC (Cri) 524, wherein in no uncertain terms it has been observed that tendering of a witness for cross-examination without there being any examination-in-chief is not permissible. It is not only not permissible but tantamount to giving up of a witness

and the practice would be inconsistent with Section 138 of the Indian Evidence Act. As regards tendering of witness only for cross-examination there has been consistent view and way back since 1942, the Bombay High Court had taken similar view as reported AIR 1942 Bombay 37, in the case of Sadeppa Gireppa Mutgi v. Emperor. In that case, speaking for the Division Bench, Beaumount, C.J. observed as under:

> "The other Kakeri witness is Shambu, (Ex.34) and a very irregular course was adopted with regard to him. He was tendered for cross-examination. The practice of tendering witnesses for cross-examination, which is no doubt often adopted, is inconsistent with Section 138, Evidence Act, which says that witnesses shall be first examined-in-chief, and then, if the adverse party so desires, cross-examined, and, if the party calling him so desires, re-examined. It is obvious that if a witness is examined by the defence without having given any evidence-in-chief, he is not being cross-examined, by whatever name the process may be described. The practice of tendering for cross- examination should only be adopted in cases of witnesses of secondary importance. Where the prosecution have already got sufficient evidence on a particular point, and do not want to waste time by examining a witness who was examined in the lower court, but at the same time do not want to deprive the accused of the right of cross-examining such witness, they tender him for cross- examination. But, I think, strictly speaking, the witness ought to be asked by the prosecution, with the consent, of course, of the pleader for the accused, and the leave of the Judge, whether his evidence in the lower court is true. If he gives a general answer as to the truth of his evidence in the lower court, he can be cross- examined on that. But he must in some way be examined-in-chief before he can be cross-examined. However, the practice of tendering a witness for cross-examination certainly should not be employed in the case of an important eye witness."

This view was also approved by the Full Bench of the Bombay High Court in the case of Emperor v. Kasamalli Mirzalli, reported in AIR 1942 Bombay 71.

On perusal of the order passed below Ex.32, for tendering

this witness only for cross-examination, it appears that the learned trial Judge placed reliance on the decision of the Supreme Court in the case of State of U.P. v. Jaggo, reported in AIR 1971 SC 1586. The only thing which can be said by us is that the learned trial Judge placed reliance upon this judgment erroneously and by reading some of the observations from the judgment in isolation and divorced from the context in which the same were made. This practice is strongly deprecated by the Supreme Court in Sukhwant Singh's case (supra), the Supreme Court observed that observations from a judgment of the Supreme Court cannot be read in isolation and divorced from the context in which the same were made and it is improper for any court to take out a sentence from the judgment, divorced from the context in which it was given, and treat such an isolated sentence as the complete enunciation of law by the Supreme Court. In that case the Supreme Court further observed that mere ipse dixit of the prosecutor that a particular witness has been won over is not conclusive of that allegation and the Court should not accept the same mechanically and relieve the prosecutor of his obligation to examine such a witness and offer the witness for cross-examination. Therefore, in view of the law discussed hereinabove, we are of the view that the testimony of P.W.11, Manilal Nyalchand Sanghvi, who has only been tendered for cross-examination is not a piece of evidence and cannot be relied upon for any purpose. Such witness shall be deemed to have been abandoned hence so-called evidence brought in cross examination has to be discarded in toto.

As regards merits, we have been taken through evidence of P.W.1, Ex. 11, Meghji Ambavi, a child witness and the complainant, P.W.3, Ex.18, Manaben Ambavi, P.W.4, Ex.19, Monghiben, wife of Karman (wife of elder brother of complainant), P.W.5, Ex.20, Meghibai Bhoja (grand mother of complainant) and medical evidence of P.W.10, Ex.34, Dr. Dayal Mavji Bhadra. It is true that the prosecution has not examined any independent witness. All the witnesses referred to above are practically the family members/relatives and, therefore, it is argued by Mr. Budhbhatti that the witnesses are interested and partisan and cannot be relied upon. We are unable to convince ourselves to this submission. As we find no law which says that in every case evidence coming forth from an interested or partisan witness has to be discarded and thrown away. Merely because a witness is interested his testimony cannot be discarded or thrown away but the Court has to assess it with great care and caution and keeping in mind whether otherwise the witness is reliable and trustworthy. In the judgment reported in the case of

Meharaj Singh v. State of U.P., reported in 1994 (5) SCC, 188, the Supreme Court has held that testimony of interested witnesses cannot be discarded on the sole ground that of interestingness but should be subjected to close scrutiny. Apart from this fact, the record must discloses possibility of securing independent witness. If from the record it is found that there was possibility for securing independent witness and still, for the reasons best known to the prosecution, has not secured then in a given set of fact the Court can raise presumption about embellishment and view the testimony with suspicion. In this case, a pointed question was asked to the complainant by the defence as regards presence of independent witness at the time of occurrence. It was denied by the complainant that the incident resulted in commotion followed by assembling of independent witnesses from the nearby locality. This evidently makes it clear that the occurrence of the incident was not seen by any independent witness. Whosoever might have come there, may be after the occurrence of the incident and, therefore, by no stretch of efforts it was ever possible for the prosecution to secure evidence from any independent witness. corroborating occurrence. Hence, this circumstance alone cannot be fatal for prosecution. However, we say that the evidence of interested witness shall have to be assessed with great care and caution keeping in mind their trustworthiness, reliability and credibility.

As regards unlawful assembly, Mr. Raval, learned A.P.P. has invited our attention to FIR, Ex.43 and oral testimony of P.W.3, P.W.4 and P.W.5. All the witnesses are consistent that all the six accused came armed with weapons. Since the main door was chained from inside they knocked and ultimately broke open paving way for entry and then they committed the act complained. Entry of all the accused together armed with weapons, may be stick, stone or scythe, raising shouts in search of male members as their prey, is nothing else but a live example of having common intention and a common design to commit any offence. The trial Court is right in holding unlawful assembly having common design and object of committing an offence. All the witnesses are consistent that immediately after entering they first assaulted Rajiben, then Meghiben and Monghiben and lastly injured Ambavi. Except deceased Ambavi, rest of the witnesses were beaten up whereas Ambavi was done to death. Thus, the conduct of accused and circumstances are sufficient to infer common concert with unlawful object. Circumstances do not warrant independent evidence for prior concert. Since the evidence is consistent with the

record for constitution of unlawful assembly with an object of committing offence, we have no hesitation in saying that every member of such an unlawful assembly is vicariously liable as contemplated under Section 149 of the IPC.

Once the prosecution proves unlawful assembly, it is always not necessary that participation of individual member is required to be corroborated by any other independent evidence or circumstance. A member of such assembly cannot be acquitted for want of corroboration, that is, proof of individual participation in commission of offence committed other members. Our this view is fortified by decision of the Supreme Court in the case of Lalji v. State of U.P., reported in AIR 1989 SC 754. Since the appellants in Criminal Appeal No.695 of 1988 have been proved to be members of unlawful assembly each of them would be vicariously liable for commission of the offence committed by either of them. At this juncture, Mr. Budhbhatti, learned advocate for the appellants, has argued that the prosecution has utterly failed to establish presence of accused No.6, Padhiyar Vankaji Modji, that is, respondent in Criminal Appeal No.721 of 1988 and thus supports the order of acquittal. It is true that name of respondent/original accused No.6 is not shown in the FIR Ex.43. But every P.W. Nos.3, 4 and 5 are consistent about his participation and overact. Now a question arises as to what extent the omission of disclosing name in the FIR would be fatal to the prosecution? Here, we are faced with a situation wherein the complainant is a child witness. We are faced with a situation where suddenly all the accused came, broke open the door and entered the house to fulfil their object. In such a situation, what can be expected from a child witness like the complainant, Meghji Ambavi? Any person facing such situation would get frightened, mentally shocked and disturbed and would not be able to reproduce entire incident videographically, but having restored normalcy (free from above state of mind) categorically states about participation of Padhiyar Vankaji Modji, respondent/original accused No.6 to the police and, therefore, having regard to the circumstances, such omission cannot be of any significance and fatal to the prosecution case. With this observation, we say that all the witness are consistent about participation of original accused No.6/respondent. We do not understand as to why the name of accused No.6/respondent is to be falsely implicated. Nothing material emerges from the cross-examination of any of the witnesses as no special reason or previous enmity is alleged with appellant No.6. The prosecution witness No.5, grand mother of

complainant, is aged about 80 years. Her testimony is at Ex.20. Owing to weak eye sight, she is not able to see or identify even if attempt is made from close. Yet, she has categorically stated that since decades she is staying in the village, she can identify persons phonetically. During the course of her examination, she was requested to identify some of the persons sitting but owing to weak vision she was not able to identify. However, when person sitting told his name, she could identify him and could also say about his caste status and profession. The person sought to be identified in court was Petha Harijan and on hearing his voice she immediately identified himself as Sarpanch of village Nilpar. With this unchallenged and independent evidence coming on record, we see no reason about the true and correct identification of persons forming unlawful assembly and participating in committing offence as they were heard shouting while paving entry and assaulting witness. Thus witness has rightly identified accused No.6 as being member of unlawful assembly and, therefore, he is equally responsible and vicariously liable for offence committed by any other member of the unlawful assembly.

P.W.12, Investigating Officer, Ex. 42, has also stated that on the strength of information Ex.50 when he visited the site, he first saw the dead-body of Ranubha lying on the road and thereafter went inside the house of Ambavi and assessed the situation. Here a lame attempt is made by defence that the prosecution has failed to explain injury, that is, death of accused, and therefore, benefit must be given to accused/appellant. But, in cross-examination of the complainant we find answer to this submission. In para 15 of his testimony, Ex.11, the complainant has stated that first Ranubha attacked his father, deceased Ambavi and, therefore, the deceased Ambavi also retaliated in self-defence by stick. This not only explains the injury sustained by accused (death of Ranubha) but also amply proves that deceased Ranubha was the aggressor and was first to start the quarrel. It is also evident from para 18 of his testimony as a suggestion is made that as deceased Ambavi abused Ranubha he attacked and assaulted deceased Ambavi. In our view, evidence is sufficient to explain injuries on Ranubha.

Assailing independence of investigation and alleging embellishment, it is submitted that no blood marks were found at the place of incident. But a bare look at Ex.30, Panchnama of scene of offence, dismisses this contention. Blood stains were found on the spot. The Panchnama further fortifies the case of prosecution with

regard to breaking open door as the same was found broken, use of stones, etc. It is true that blood stains have not been found outside the courtyard and is rightly so as the incident did not take place outside the courtyard but inside the house. As per prosecution case, only a minor incident did precede out side the courtyard but in that incident deceased Ranubha had just assaulted deceased Ambavi with a stick. Though he was assaulted it has come on record that it did not cause profuse bleeding. Moreover, immediately after the incident the deceased Ambavi was brought in and was made to lie on a cot and, therefore, rightly no blood stains are found outside the courtyard and absence cannot be fatal to the prosecution case.

Oral evidence of prosecution also gets corroboration from medical evidence. In order to bring on record medical evidence, prosecution has examined Dr. Dayal Mavji Bhadra, P.W.10, at Ex.34. This witness performed post-mortem examination of deceased Ambavi as well as deceased Ranubha and also examined and treated other injured witnesses. The post-mortem report of deceased Ambavi is placed at Ex.36. External injuries are referred to in column 17 of the post-mortem report as under:

1. Fracture of occipital bone temporal bone and parietal bone with chop wound 8"x2"x4" in size from right occipital area to right temporal bone and medial end of left parietal bone direction of fracture as upward and medially towards right side with injuries to brain substance from the wound.
2. 3"x2"x3" chop wound on occipital area on left side with fracture on occipital bone.
3. Fracture of temporal bone on left side in multiple fragments.

The internal injuries are mentioned in column 19 of the post-mortem report which are as under:

Skin teared (sic. torn) or ruptured on the site of injuries on occipital area, left temporal area and right parietal area.

Fracture of right temporal bone divided in multiple fragments and occipital also divided into multiple fragments.

Brain matter fragmented into pieces of occipital lobe and temporal lobe on right side.

According to the doctor, external injury Nos.1 and 2, facture of occipital bone and temporal bone, coupled with

chop wound and external injury No.2, chop wound on occipital area with fracture of occipital bone is sufficient to cause death in ordinary course of nature. As regards use of weapon, the doctor has stated that such injuries are possible by sharp and heavy weapon. On being shown the muddamal article 2, an axe, the doctor has positively said that injury Nos.1 and 2 are possible by this type of weapon. As regards injury No.3, this witness has stated that it is possible by stick.

Now reverting to the oral testimony it has come on record that accused Nos. 1, 5 and 6 were armed with stick, Nos.3 and 4 with stone and No.2 with axe. The deceased Ambavi was assaulted by accused No.2 with axe, followed by assault by other accused. Thus,the oral evidence and the medical evidence sufficiently corroborate each other and establishes use of muddamal articles axe and sticks with injuries. Hence we hold that the deceased Ambavi was assaulted with deadly weapons by the members of the unlawful assembly with a view to cause death and, therefore, each of the member of the assembly is equally responsible vicariously for the act done by either of them.

Mr. Budhbhatti has argued that such chop wounds cannot be possible by the muddamal article 2 and must have been caused with some other weapon for which no evidence comes forth and thereby alleges suppression of genesis of the occurrence and consequent fabrication. But as discussed above, in light of testimony of the doctor, we are unable to agree with this submission. The witness who did post-mortem examination of deceased Ranubha, has referred to the injuries sustained by deceased Ranubha in para 6 of his testimony. The post-mortem report in respect of deceased Ranubha is produced at Ex.37. External injury No.1 was in the nature of stab wound and has been certified to be sufficient to cause death in ordinary course of nature. As regards external injuries Nos.3 and 4, the witness has stated that they are possible by hard and blunt substance. Since the doctor has said that the external injury No.1 was in the nature of stab wound, Mr. Budhbhatti has argued that when none of the member of the unlawful assembly was found with knife how such an injury could have been possible? But it has come on record that nasal and maxillary bone were fractured, it cannot be gainsaid that when a small bone gets fractured, the edges have the effect of sharpness and pointedness which can result in such type of injury. If this possibility can exist then the defence arguments do not hold good and get answer without giving doubt to any doubt. Likewise, we find that Moghiben was also examined and injury

certificate Ex.38 was issued. A close scrutiny of the evidence of all the witnesses we hold that the injuries sustained by Moghiben also tally with the allegations made in connection with assault on her by the members of the unlawful assembly. In this view of fact, we are of the view that no error has been committed by the learned Additional Sessions Judge in holding that the medical evidence also corroborates the oral testimony of prosecution witnesses.

The learned advocate for the appellants has also put great emphasis on some of the contradiction brought in evidence of complainant-child witness and also others. But at the outset we say that such contradictions have no significance, none relates to the genesis and actual occurrence. These are minor contradictions concerning subsequent developments as to who came and whom informed, etc. A witness cannot be expected to give videographic account of events after lapse of time and specially a child witness and such contradictions are of no avail.

Inviting our attention to Ex.30, Panchnama (place of offence) it is argued that on the heap of wheat bags knife was found but how and from where came is not explained and, therefore, raises doubt. It is true that knife with broken handle was found but was not found with blood stains and, therefore, use in commission of offence is ruled out. Simple knife is meant for domestic use and even if it is found no inference can be drawn or connected with offence. Such knife would always be found in every house. Such knife is used for cutting bags, clothes, string and hence when found near wheat bags no suspicion can be raised and might have been placed for cutting strings in case of necessity.

In background of our discussion as above, we find no substance in Criminal Appeal No.695 of 1988 preferred by original accused Nos.1 to 5 against their conviction. The appeal is devoid of merits and does not call for interference by this Court.

The finding of the learned trial Judge acquitting original accused No.6/respondent in Criminal Appeal No.721 of 1988 deserves to be upset. We find that original accused No.6/respondent is also a member of the unlawful assembly which committed the act complained of and, therefore, is vicariously liable under Section 149 of the IPC for the offences committed by either member. The learned trial Judge was not right in holding that the participation of the original accused No.6/respondent does not get corroborated from any other evidence. Thus,

to this extent, the finding of the learned trial Judge being dehors the provisions of law requires to be upset. We hold accused No.6/respondent guilty alongwith all other accused persons/appellants in Criminal Appeal No.695 of 1988. Since the original accused No.6, respondent in Criminal Appeal No.721 of 1988 is found guilty, is required to be convicted. However, law requires that before passing sentence accused should be heard on the point of sentence. Keeping this provision in mind, vide order dated 23.2.1996, we ordered the original accused No.6/ respondent to remain personally present in Court and accordingly he is present and is heard.

Accused No.6/ respondent in Criminal Appeal No.721 of 1988 is heard. He pleads ignorance and says that at the relevant time he was not present. He further says that he is a poor man and, therefore, liberal view should be taken in awarding sentence. In our view, when an accused is held guilty, poverty is no more a ground for taking liberal view while passing order of sentence. In this case, all the accused are held guilty of offence under Section 302 read with section 149 of IPC and under Sections 326, 324 and 449 read with Section 149 of IPC. The respondent/original accused No.6 being a member of the same unlawful assembly also is to be held guilty for the same offences and punished accordingly. Since he is also held guilty under Section 302 of Indian Penal Code Court has no discretion to pass sentence less than life imprisonment.

As discussed in the very preamble of this judgment, a cross case was also filed against the appellants of Criminal Appeal No.697 of 1988, namely, Karman Ambavi Patel and Narsang Ambavi Patel, the sons of deceased Ambavi, by one of the appellants in Criminal Appeal No.695 of 1988. The cross case was registered as Sessions Case No.3 of 1988 and the learned trial Judge was pleased to convict both the accused for the offence under Section 302 read with Section 34 of IPC. Being aggrieved by the order of conviction and sentence, they preferred Criminal Appeal No.697 of 1988.

The case of prosecution solely relies upon testimony of three P.Ws, i.e., P.W. 1, P.W.3 and P.W.4 at Ex. 8, 10 and 16 respectively. P.W.Nos.3 and 4 turned hostile and did not supported the prosecution case and, therefore, their testimony has no evidential value in a criminal case. The prosecution has examined the complainant, P.W.1, at Ex.8. Mr. Mehta, learned advocate for the appellant, has invited our attention to contradictions

between oral testimony at Ex.8 and the FIR at Ex.28. Mr. Shukla, learned A.P.P. appearing for the State, when confronted with the material contradictions, could not tender satisfactory explanation. Not only there are material contradictions but the case made out in the FIR is quite inconsistent and contrary to the information Ex.27 which had been given by Tapuji Anandji at about 7.45 P.M. According to this information, he had just informed the police about quarrel between two group, namely, Patel and Darbar, and had requested for police protection. He does not say anything about death of Ranubha for which complaint is filed later. As per FIR Ex.28, it is alleged that at the relevant time, the complainant, Velubha Mansangji, in company of one Shaikh Rahimsha Allanusha was passing nearby the house of Ambavi Patel at that time he saw Ambavi Patel and his two sons, i.e., the present appellants assaulting Ranubha, the deceased and yet passed from there without noticing and proceeded towards his residence. However, within a very short time i.e., couple of minutes he changed his mind and came back on hearing commotion. The conduct appears very unnatural. In examination-in-chief he further challenges authenticity of the FIR whereas in cross-examination when confronted with one of the statements has admitted that he had so dictated and was written accordingly in FIR. Thus, the complainant renders himself untrustworthy as he makes statements to suit his convenience. If a witness is in the habit of making statement at his convenience and does not adhere to truth, then cannot be relied upon. Not only that the witness is making contradictory and inconsistent statement but his conduct is also unnatural. He is a witness alleged to have seen the actual occurrence. However, he does not intervene nor does he raise shout for help and just passes by as if nothing was noticed and goes to his residence. Even after going to his residence he had occasion to meet family members of deceased Ranubha, yet he does not inform anybody about the incident, including the mother and sister of deceased Ranubha. He had also occasion to meet some of the relatives but he remains mute about the incident. The only explanation given by him is that by seeing the incident he was frightened and, therefore, could not say anything. But then from the evidence it transpires that immediately on hearing commotion he returned at the scene of offence and sat besides the deadbody of Ranubha. It is not the case of this witness that when he returned he was accompanied by some other persons. He was alone and yet he was not shaken or frightened. He does not refer to any circumstance which boost up his courage. A couple of minutes the witness was frightened and remained mute

did not intervene and simply ignored and went away whereas within very short while, gathering courage again he came alone and sat besides the deadbody of the deceased. What an unnatural conduct of this witness! In our view, with this unnatural conduct and inconsistencies, the witness is not trustworthy, credible and reliable and, therefore, his sole testimony cannot be the basis for conviction. We hold that the learned trial Judge committed error in placing heavy reliance upon the testimony of complainant, the sole witness and convict the appellants.

While inviting our attention to Ex.27, information given by Tapuji Anandji, Mr. Mehta, learned advocate for the appellants, has argued that the prosecution has deliberately not examined Tapuji Anandji as witness. According to Mr. Mehta, Tapuji Anandji, the first person to give information, an eye witness is the proper person to disclose the real genesis of the occurrence and the prosecution having failed to examine him, adverse inference is to be drawn. We are in agreement with Mr. Mehta. Tapuji Anandji, the eye witness who gave information to the police at the earliest opportunity, should have been examined so as to unfold the true story of prosecution. In absence of unfolding true story through the eye witness and in view of inconsistencies between information Ex.27 and FIR at Ex.28, we find that the case of prosecution is doubtful and cannot be accepted in its face value. Consequently, with such weak and inconsistent evidence, it will be hazardous to convict the appellants. Mr. Shukla, learned A.P.P. has not been able to convince the Court about the trustworthiness of prosecution case. In this view of fact, Criminal Appeal No.697 of 1988 deserves to be allowed.

We, therefore, pass following order:

Criminal Appeal No.695 of 1988 is dismissed. The order of conviction and sentence passed by the learned trial Judge is confirmed. Appellant Nos.4 and 5, Jethubha Modji and Manuji Modji respectively are on bail and, therefore, are directed to surrender before the trial Court on or before 10.4.1996 to serve out the sentence.

Criminal Appeal No.697 of 1988 is allowed. The order of conviction and sentence passed by the learned trial Judge is quashed and set aside. The appellants, Karman Ambavi Patel and Narsang Ambavi Patel, are acquitted. Since the appellants are on bail, bail bonds are cancelled.

Criminal Appeal No.721 of 1988, preferred by the State, is allowed. The order of acquittal passed against the original accused No.6/respondent - Padhiyar Vankaji Modji- is set aside and is convicted for the offences under Section 302 read with Section 149 of IPC and under Sections 326, 324 and 449 read with Section 149 of the IPC and is sentenced to undergo rigorous imprisonment for life and to pay fine of Rs.500/- and in default to further undergo simple imprisonment for one month for the offence under Section 302 read with Section 149 of IPC. As regards offence under Section 326 of IPC, is ordered to undergo rigorous imprisonment for three years, as regards offence under Section 324 of IPC is ordered to undergo rigorous imprisonment for one year and as regards offence under Section 449 read with Section 149 of IPC, is ordered to undergo rigorous imprisonment for three years. All the substantive sentences to run concurrently. Respondent/original accused No.6 is on bail hence is to surrender before the trial Court on or before 10.4.1996 to serve out the sentence. If the respondent/original accused No.6 does not surrender before the trial Court within the stipulated period, the trial court is at liberty to take appropriate steps in accordance with law for securing his presence.